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No. 07-905

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IN THE

Supreme Court of the United States

THOMAS LAMONT DYNO,

Petitioner,

v.

VILLAGE OF JOHNSON CITY, NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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PROCEDURAL HISTORY

Petitioner, Thomas L. Dyno, commenced an action in the United States District Court for the Northern District of New York pursuant to 42 U.S.C. § 1983 ("§ 1983") alleging that the Respondent, the Village of Johnson City ("Village"), violated his civil rights.[1] The allegations in Mr. Dyno's federal Complaint were repeatedly presented in New York's state trial and appellate courts, which found his claims to be without merit.[2] The Village filed a motion to dismiss Mr. Dyno's federal claims pursuant to F.R.C.P. 12(b)(6), which was granted by the Northern District of New York. Mr. Dyno appealed this decision to the U.S. Second Circuit Court of Appeals, which likewise dismissed his claims. He now seeks review of his case by the U.S. Supreme Court.

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1. The Village is the only respondent listed on Mr. Dyno's Petition. The Second Circuit affirmed the dismissal of Mr. Dyno's claims against the Village's Mayor, Harry G. Lewis, and his former neighbors, the Greenes. Mr. Dyno's Petition here does not appear to challenge the dismissal of those claims, but to the extent necessary, the propriety of the Circuit Court's dismissal of the claims against Mayor Lewis, individually, is addressed in Point I, *infra*.

2. As noted in the September 27, 2004 Decision and Order of District Court Judge Mordue, Mr. Dyno "is a well-known litigant in the state courts having brought a series of *pro se* actions and proceedings before administrative agencies and state courts over the last eight years." (A-8) Judge Mordue's Decision sets forth a succinct history of Mr. Dyno's numerous attempts to present the same claims in various forums. (A-8 – A-10)

ARGUMENT

As stated by the Second Circuit below, to succeed on a § 1983 claim, a plaintiff must show that a defendant, acting under color of state law, deprived the plaintiff of a constitutional right. (A-3 – A-4) (*citing Rendell-Baker v. Kohn*, 457 U.S. 830, 838, (1982); *Rodriguez v. Phillips*, 66 F.3d 470, 481 (2d Cir. 1995)). The Second Circuit properly dismissed Mr. Dyno's Complaint because he failed to state a viable claim that the Village's mayor, Harry G. Lewis, was personally involved in depriving Mr. Dyno of a constitutional property right, or that the Village had an official custom or policy "to refuse to enforce zoning regulations or to rely on allegedly improperly obtained state court judgments[,]" which deprived him of constitutionally protected property rights. (A-5) In addition, the Circuit Court was correct in holding that Mr. Dyno's claims could have been dismissed on *res judicata* grounds because he should have raised them in his actions before the state courts. (A-5) Accordingly, the Second Circuit's decision dismissing Mr. Dyno's Complaint should be affirmed.

Point I

The Second Circuit properly held that Mr. Dyno failed to state a claim sufficient to attach personal liability to Mayor Lewis.

The Second Circuit properly held that Mr. Dyno failed to state a viable § 1983 against Mayor Lewis in a personal capacity. As noted by the Circuit Court,

> [P]ersonal involvement of defendants in alleged constitutional deprivations is a prerequisite to

> an award of damages under § 1983, and can occur by direct participation in the alleged violation, a supervisory official's failure to remedy a wrong, a supervisory official's creation of a policy or custom under which unconstitutional acts occurred, or through a supervisory official's gross negligence in managing his subordinates.

(A-4) (*citing Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir. 1986) (*quoting McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir. 1977)). The Circuit Court went on to note that since Mr. Dyno failed to present any argument or facts that distinguish the actions of Mayor Lewis from the Village, other than that the mayor implemented a supposed Village custom or policy, liability could not attach to him. (A-4)

The Circuit Court's decision dismissing Mr. Dyno's claims against Mayor Lewis, personally, was appropriate. In order to defeat the Village's motion to dismiss, Mr. Dyno's Complaint must have alleged that Mayor Lewis was personally involved in the deprivation of his constitutional rights. Mere conclusory statements and "bald assertions" do not suffice. *Davis v. County of Nassau*, 355 F. Supp. 3d 668, 677 (E.D.N.Y. 2005). A § 1983 complaint that does not allege personal involvement is "fatally defective on its face." *Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 886 (2d Cir. 1987). Thus, the law is quite clear that personal liability will attach only if there is proof of direct individual participation in the acts allegedly resulting in a constitutional violation.

Mr. Dyno failed to make any claims about Mayor Lewis' personal involvement in this matter, other than the Mayor's assertion that the Village would comply with a state court's decision. As noted by the courts below, Mr. Dyno failed to set forth any facts indicating what, if anything, Mayor Lewis did to violate his constitutional rights. Mr. Dyno has failed to address this issue with any specificity. Indeed, his only claim in this regard is that Mayor Lewis, as the Village's chief executive officer, informed him that the Village intended to comply with the decision of the New York State Supreme Court, which dismissed Mr. Dyno's challenge to the decision of the Village's Zoning Board of Appeals. This lone statement does not meet the personal participation requirement. A defendant in a § 1983 claim cannot be held liable simply because he held a high position of authority. *Davis*, 355 F. Supp. 3d at 676. In the absence of personal participation in the alleged constitutional violation, Mr. Dyno's claim against Mayor Lewis is insufficient and was properly dismissed by the Second Circuit.

Point II

The Second Circuit correctly held that Mr. Dyno's Complaint fails to state a viable § 1983 against the Village.

Similar to its dismissal of the claims against Mayor Lewis, the Second Circuit properly dismissed Mr. Dyno's Complaint against the Village. To impose liability on the Village under § 1983, Mr. Dyno must prove that the Village had a "municipal custom or policy" that caused the violation of his constitutional rights. (A-4) (*citing Dwares v. New York*, 985 F.2d 94, 100 (2d Cir. 1993)).

Because Mr. Dyno did not distinguish between the actions of the Village and its mayor, the Second Circuit held that his claim depends entirely on (1) his ability to show an improper municipal custom or policy that (2) deprived him of a constitutional right. (A-4) He failed to do either and his Complaint was, therefore, properly dismissed.

A. Mr. Dyno's Complaint fails to set forth a municipal custom or policy that resulted in constitutional violations.

Mr. Dyno argues that the Village improperly relied upon the decision of the New York State Supreme Court dismissing his challenge to the Village's interpretation of its zoning ordinance to prohibit his neighbors from using their basketball hoop. He contends that this judgment was obtained by a fraud on the court. As noted by the Second Circuit, this issue was fully litigated in the state courts and Mr. Dyno's position was rejected.[3] In the subsequent federal litigation now before the Court, Mr. Dyno contends that the Village's reliance on this state court judgment represents a "policy action" that deprived him of constitutional rights.[4] This assertion

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3. The Village flatly rejects that it, or its attorneys, perpetrated any fraud upon any court or tribunal involved in this matter. Thus far, all courts considering Mr. Dyno's claims in that regard have dismissed his allegations.

4. *See, e.g.*, page 20 of Mr. Dyno's brief, wherein he states, "Please note, I'm not asking you to vacate said ¶78 judgment but want a declaration that it cannot serve as the basis of legitimate municipal policy[,]" and page 7, "The Federal causes of action arose, 1st on March 6 1998, when the Mayor adopted said ¶ 78 judgment as the basis of his policy decision and the course of Village policy actions, which flowed therefrom."

is specious. Reliance on a court decision does not represent a formal policy, nor has Mr. Dyno made "any allegation that it was the official policy of the Village to refuse to enforce zoning regulations or to rely on allegedly improperly obtained state court judgments." (A-4 – A-5) As the Second Circuit pointed out, Mr. Dyno merely argues "that the Village misinterpreted the relevant zoning provisions and subsequently relied on a state court judgment to affirm those misinterpretations. . . ." (A-5) Contrary to Mr. Dyno's contention, the Village engaged in no wrongdoing by relying on the state court judgment, and he has not provided any legal precedent to indicate that doing so was inappropriate.

Mr. Dyno also repeatedly asserts that the Village trampled his rights by "suing" him and vigorously opposing him in the state court proceedings. (*See, e.g.*, A-5 and A-16) This claim is without merit because it fails to demonstrate an impermissible municipal custom or policy, and is disingenuous. Mr. Dyno fails to disclose that after his initial challenge to the Village's interpretation of its zoning ordinances was dismissed, he named the Village as a party in an application for a preliminary injunction to prohibit his neighbors from using their basketball hoop while his appeal from that dismissal was pending. In response, the Village sought to enjoin him from filing further claims, which was granted. (A-9 – A-10, A-76 – A-77) Mr. Dyno characterizes this action as the Village "suing" him, but the Village did nothing more that respond legally to his claim. The Village's opposition to Mr. Dyno's application does not equate to a municipal policy or practice. Further, it did not serve to deprive Mr. Dyno of any right. The final decision on the Village's application was left to the court.

The Village's application for a preliminary injunction to prohibit him from filing further claims arising from the same facts and circumstances was based on a sound legal foundation. Mr. Dyno's continued attempts to litigate the same claims were, and are, a drain on Village finances and a waste of its officials' time. The Village's decision to pursue injunctive relief was not a policy determination, but rather a legal decision precipitated by Mr. Dyno's own conduct. He makes no allegation that the Village had a policy or custom of seeking injunctive relief against its citizens, or even if it did, that such custom or policy violated his constitutional rights.[5] The Village's decision to seek an injunction to prevent Mr. Dyno from bringing further baseless litigation was neither a policy action nor unlawful. The state court's decision to grant a preliminary injunction against such further claims affirmed the solid legal foundation for the Village's action. As Mr. Dyno has failed to allege any facts to support an inference that a formal practice, policy or custom endorsed by the Village ever existed, the Second Circuit properly dismissed his Complaint.

B. Mr. Dyno's Complaint fails to set forth any cognizable constitutional violations.

Even if Mr. Dyno could demonstrate the existence of an improper municipal custom or policy, he fails to identify a cognizable constitutional right that was violated or establish that the policy led to a violation of such right. In order to establish municipal liability, the policy alleged must be the moving force behind, and actually cause, the violation of constitutional rights.

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5. The Village has no such policy.

(A-13) (*citing Monell v. Dep't of Soc. Serv. Of the City of N.Y.*, 436 U.S. 658, 692 (1978)). Here, Mr. Dyno has failed to make the slightest showing that he suffered the deprivation of any constitutional right due to action taken by the Village.

Mr. Dyno argues that the Village violated his due process rights by following the state court decisions dismissing his claims, thereby denying him the opportunity to fully present those claims. (*See, e.g.*, Mr. Dyno brief pp. 13, 14) This allegation is completely unfounded as he has had numerous opportunities to present his claims to both state and federal courts. Indeed, Mr. Dyno's grievance is not that he has not been afforded an opportunity to present his claims, but rather that he has not liked the results. *See Brault v. Town of Milton*, 527 F.2d 736, 738-39 (2d Cir. 1975).

Mr. Dyno also seems to assert that the Village violated his due process rights by interpreting its zoning ordinance and complying with the state court rulings, thereby insinuating itself into his dispute with his neighbor *on their side*. (A-23, A-24) This claim is absurd, particularly since the Village chose *not* to intervene in Mr. Dyno's dispute with the Greenes. The Village merely determined that the Greene's use of their basketball hoop within a residential neighborhood was not a zoning violation and, therefore, it could not cite them for any violations. In doing so, the Village did nothing to deprive Mr. Dyno of the use of his property.

Mr. Dyno also argues that the Village imposed a private nuisance upon him by failing to stop his neighbor's use of their property in a manner he found

objectionable. (A-12 – A-14) The specious nature of this claim is obvious. If Mr. Dyno believed that his neighbors' use of their property created a private nuisance, his proper course of action would have been to bring a civil claim against them. He never took advantage of this opportunity, but instead decided to pursue claims against the Village. His pursuit of the Village has been, at the least, misguided, which is why the Second Circuit properly disposed of his Complaint.

Point III

The Second Circuit properly found that Mr. Dyno's claims are barred by *res judicata*.

The Second Circuit properly found that all of the claims Mr. Dyno has attempted to bring before the federal courts were, or could have been, litigated in the state court proceedings and were, therefore, barred by the doctrine of *res judicata*. (A-5) In *Collard v. Village of Flower Hill*, 759 F.2d 205, 207 (2d Cir. 1985), the Second Circuit affirmed the dismissal of a § 1983 claim on *res judicata* grounds by stating that "a district court is precluded from hearing a claim that could have been but was not raised in a state court proceeding, if the courts of that state would be precluded from hearing that claim." According to the *Collard* court, *Migra v. Warren City Sch. Dist.*, 465 U.S. 75 (1984), dictates that a federal district court is precluded from hearing a claim that could have been, but was not, raised in a state court proceeding if the courts of that state would likewise be precluded from hearing that claim. *Id.* For example, under New York law, if the constitutional claims that form the gravamen of a federal district court action could have

been brought in an earlier state court proceeding, the New York law of claim preclusion bars those subsequent claims from being brought in state court. *See Kovarsky v. Housing Develop. Admin.*, 31 N.Y.2d 184 (1982). Such is the present case regarding Mr. Dyno's claims.

While Mr. Dyno's § 1983 claims were not litigated in the state court proceedings, all of his claims are based on the same facts and circumstances as alleged in those prior actions. Certainly, the state courts would not hear Mr. Dyno's claims that the Village relied upon a "bad" decision as a basis for a § 1983 civil rights claim, and neither should the federal courts. The Second Circuit correctly found that Mr. Dyno's situation was indistinguishable from the circumstances in *Collard* as he "clearly could have raised his claims regarding the Village's alleged municipal policy in his Article 78 proceedings." (A-5) Accordingly, his Complaint was properly dismissed on the grounds of *res judicata* (*i.e.*, claim preclusion).

CONCLUSION

Based on the foregoing, the Village respectfully contends that the Second Circuit's decision dismissing the Complaint be affirmed in its entirety, together with such other relief that the Court deems appropriate.

Respectfully submitted,

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